Commentary on Cecilia Moore's Case

Sean Murphy, Administrator
Protection of Conscience Project

Introduction

The following commentary concerns the case of Cecilia Moore, a welfare worker who was fired for refusing to authorize medical coverage for an abortion. The case is reported in Moore v British Columbia [Ministry of Social Services], Canadian Human Rights Reporter, Vol. 17, Decision 24. Additional material has been obtained from the Summary of the Evidence of Cecilia Moore that was prepared for the hearing.

Union responsibility

A labour lawyer familiar with the case has noted that the British Columbia Government Employees Union could have been found liable because it failed to support Moore. Remedies lie under labour legislation in most Canadian provinces, and the Union might also have been sued for discrimination under human rights legislation. However, the issue was not adjudicated because the case was against the government and did not deal with the Union's duty of fair representation.

On accommodation

Cecilia Moore was fired in 1985. Two points should be noted, in fairness to her supervisors. First: they were dealing with an issue for which there was no precedent in the Ministry. Second: it was only in 1985 that the Supreme Court of Canada affirmed the legal concept of "adverse effect discrimination."[1] In deciding Moore's case, the Human Rights Council had the benefit of this decision, and a of a further clarification by the Supreme Court in another case five years later.[2] Thus, at the time, Moore's supervisors lacked both experience and the subsequently developed legal framework to assist them in their decision making.

The fact remains that they refused to consider the accommodation suggested by the union representative, who was also without the benefit of experience or legal guidance. Moore had repeatedly told Wilmot that she would refer cases involving conflicts of conscience to her supervisor, and this would have permitted the kind of simple, common-sense arrangement noted by the Human Rights Council: "An exemption or reassignment of files could be undertaken without an increase in the caseloads of other workers by assigning an equivalent number of files from those caseloads to the complainant."[3]

In fact, by the time of the Tribunal hearing in 1992 it had been determined that accommodation for conscientious objectors was sometimes allowed.

Over a period of 17 years, Margaret MacLeod, a voucher clerk in the Ministry's Powell River office, had been exempted on three or four occasions from signing or mailing documents involving coverage or payments for abortion. However, the practice does not appear to have been officially recognized. Moore asserted that she had learned of two other exempted employees, but noted that they were "afraid to testify for fear of reprisals."[4]

Criticism of Moore

The Council asserted that, in accepting the file, Moore acted improperly, and was therefore partly to blame for the chain of events that followed:

> In this case, there was an obvious conflict between the client's request and the complainant's strongly held religious beliefs on abortion. Nevertheless, the complainant met with the client. She discussed her opposition to abortion with the client and then rendered a decision that was consistent with her position. From the client's perspective, the complainant would not have given the appearance of being an impartial decision maker. It is my view that voluntary disqualification would have been the appropriate course of action in this type of situation. In this case, the complainant did not recognize her duty as a public servant in this regard.[5]

It will presently be seen that this passage includes a statement that is factually inaccurate. Apart from that, this retrospective criticism presumes three things; first: that the client was clearly eligible for assistance; second: that Moore ought to have foreseen that her views on abortion would conflict with her clear duty to provide medical coverage; third: that her employer would have been more accommodating had she raised the matter at the start. Closer examination will demonstrate that these presumptions were not supported by the evidence. However, one must first affirm three principles underpinning the Council's view:[6]

- members of the public are entitled to impartial and unbiased treatment by public servants;
- public servants are especially obligated to act "in an impartial and unbiased manner;"
- sound public policy favours disclosure of bias or conflicts of interest, and voluntary disqualification.

What follows, then, while somewhat critical of the approach taken by the Council, does not mean that voluntary disqualification might not have been an appropriate response on other grounds.

Policy

The Deputy Minister told the Human Rights Tribunal that no policy existed under the Regulations for funding abortion,[7] but Ministry had previously paid for an abortion for the same client seen by Moore.[8] Moreover, the Deputy Minister's testimony on this point was inconsistent with that offered by other officials in the Ministry.

Art Temple, for example, testified that coverage for abortion could be provided by classifying pregnant women as "unemployable", which made them eligible for medical coverage. How they subsequently chose to use that coverage was not the Ministry's business.[9] Lori Mist, a senior Ministry official, testified to the same effect. She added that temporary coverage could also have been granted if the woman insisted that she was employable but unable to provide her own coverage. Despite the

regulation's reference to an "urgent" need for "an essential medical service" that required verification by the FAW, Mist claimed that "confirmation of a specific medical procedure was not required."[10] She does not appear to have explained how an abortion that was deemed medically contra-indicated could have been interpreted to be "an essential medical service," and the Council did not address this point in its ruling.

Note also that the 'pro-choice' worker consulted by Moore agreed with Moore's interpretation of policy in denying coverage, yet 'pro-choice' supervisor Bill Little took the opposite view. Moreover, Art Temple signed the authorization in Moore's place,[11] but he could not explain to the Council which section of the Regulations he applied when allowing the appeal,[12] and he conceded that Moore's interpretation of policy was technically correct.[13]

. . .this style of management would naturally generate confusion and conflict among workers who had not been initiated into the 'winks and nods' system of decision making exemplified, in particular, by Temple and Little.

Taken as a whole, the evidence before the Council indicated that coverage for abortion, while not officially authorized, was nonetheless rationalized by creative policy interpretation on an *ad hoc* basis, and accommodation of conscientious objectors provided for in the same way. Perhaps this was the result of poor administration; perhaps ambiguity was thought to be desirable in view of the political and legal issues surrounding abortion at the time. Whatever the case, this style of management would naturally generate confusion and conflict among workers who had not been initiated into the 'winks and nods' system of decision making exemplified, in particular, by Temple and Little.

Unfortunately, the Council failed to recognize this aspect of the case. Instead, it appears to have uncritically accepted Lori Mist's assertion that the client was eligible for coverage, even as it noted inconsistencies in the evidence on this point.[14] This substantially undercuts the first presumption underlying the Council's criticism of Moore: clarity of policy.

Foreseeability of conflict

The Human Rights Council appears to have had the view that Catholic belief about abortion, expressed, for example, in the Second Vatican Council's condemnation of abortion as "an abominable crime"[15] would automatically place Moore, a Catholic, in conflict with her job requirements vis-à-vis a client seeking financial support for an abortion. Further, it described this conflict as "obvious."

A different perspective yields a different understanding. Catholic teaching about abortion does not relieve an employee of legitimate obligations to an employer or to other people; Christ's injunction requires that one render to Caesar the things that are Caesar's and to God the things that are God's. Moore did not know how the Ministry dealt with such requests when she accepted the file. It would have been premature to disqualify herself before she had explored the extent to which it was possible for her to fulfill her obligation to Caesar without compromising her obligation to God.

One is left with the impression that the Council's second presumption was grounded in an inadequate understanding of Catholic teaching on faith and reason. This is not surprising, since

religious belief is often viewed by secular authorities as a kind of irrational prejudice rather than something capable of intelligent application. Counsel acting for people like Moore should take this into account in case preparation and presentation.

Possibility of disqualification

Had Moore disqualified herself at the outset, the subsequent attitude and conduct of her supervisors strongly suggest that she would have been dismissed for refusing to accept the file. And it is by no means clear that she would have been successful in a civil or human rights action in that case, since she would not have been able to clearly establish (without having reviewed the file and the policy) that what was being asked of her was actually contrary to her faith.

Now, Moore did not analyse the situation in these terms at the time. She responded as one might expect an inexperienced probationary employee to respond; she accepted the file without a clear idea of what would be required of her or what she was going to do. Her surprise and perplexity were reflected in her spontaneous utterance, "I don't believe in abortion." But what she subsequently did do - review the Ministry policy and reflect upon her training - clearly demonstrates a thoughtful and reasonable approach to the case, consistent with her Catholic faith.

The decision to meet the client

Was it proper for Moore to meet with the client? A distinction must be made between prudence and propriety. If, having reviewed Caesar's policy, Moore had grounds to believe that the client would be eligible for coverage, it would have been improper for her to do so. However, if the policy clearly indicated ineligibility, Moore could have handled the case without conflict. As has been noted, Ministry policy was anything but clear. The only way to determine the issue was to interview the client.

This is not enough to establish that it was prudent for her to continue with the file. A more experienced worker having the same view on abortion - especially a permanent employee with union seniority - might well have anticipated complications, and sought reassignment . On the other hand, Moore was a probationer, working for a "tough" supervisor, subject to dismissal without cause during the first three months of her employment, and honestly trying to do her job to the best of her ability.

The Council's criticism of Moore might have been more balanced had it recognized the lack of clarity in Ministry policy, understood the practical application of religious belief, reflected upon the attitude and conduct of Moore's supervisors, and more carefully considered the position of Moore herself.

Meeting the client

Having concluded that Caesar's policy made the client ineligible for coverage, and having confirmed her conclusion with a more experienced colleague who did not share her views about abortion, Moore advised the client of her decision, and of the right to appeal to Caesar. After doing this, at the end of the interview , Moore explained that her own views on abortion would have precluded her authorizing coverage even if policy had allowed it.

The Council magnified the significance of the comment by reversing the order of events in the wording of its judgement, unfairly implying that Moore's decision was based on her religious belief

rather than Ministry policy. Actually, Moore's explanation was a spontaneous outburst of honesty that incidentally confirmed that her decision was made for policy reasons. A more experienced worker would probably have avoided the comment as being unnecessary. The Human Rights Council quite rightly noted that Moore's reference to her own opinion about abortion was likely to compromise the appearance of impartiality.

But there was no evidence before the Council that Moore actually was affected by bias or partiality in her dealings with the client. In fact, there was no evidence before the Council that Moore's religious beliefs were in play at any point before Temple ordered her to sign the authorization. This is why the Council had some difficulty in establishing the moment of adverse impact,[16] ultimately deciding that it occurred when she was ordered to sign the document by her supervisor.[17]

Criminal law: checks and balances or winks and nods?

At the time of this incident, all abortions in Canada had to be pre-authorized by a hospital's therapeutic abortion committee. Such authorization could be legally granted only when the procedure was necessary to preserve the life or health of the mother. Thus, the abortion that Cecilia Moore was ordered to facilitate would have been a prima facie criminal offence at the time, and Moore made this point in her meeting with Art Temple.[18] She was actually concerned that signing the authorization would leave her open to criminal prosecution.[19]

The situation faced by Moore should never have arisen, but it did not arise by accident. It was a natural consequence of a process described by a physician who served for years on a therapeutic abortion committee:

> . . . not once at committee meetings did I witness discussion as regards the health merits of a particular case. It was assumed that if the referring doctor and the woman had decided that the pregnancy would impair the patients health *as she understood it* (Ed. -emphasis added) then no further enquiry was necessary or possible.[20]

In other words, a committee of physicians rubber-stamped every application received, and, when necessary, like-minded officials in Moore's department were willing to co-operate, without asking awkward questions.

The Supreme Court of Canada had struck down all restrictions on abortion four years before the Moore case was heard, and the issue was not raised in the Council's summation of the evidence, nor in its ruling. Now, it was not necessary for the Council to consider the state of the criminal law in 1985 in order to adjudicate Moore's complaint, and avoiding the apparent illegality of the proposed procedure doubtless simplified the issues that it had to address. What bears notice is that those in positions of authority and responsibility in the Ministry at the time of the incident were bound to consider the criminal law - and not one of them - including the Deputy Minister - appears to have done so.

The Human Rights Council did not make even an obiter comment about this elastic sense of legal obligation; it is as if the Council considered such elasticity to have been a necessary adjunct to Gabor Mate's rubber-stamp committees. One may see in this a quasi-judicial affirmation of an unofficial praxis intended to circumvent the criminal law.

All of this challenges the notion that euthanasia, assisted suicide, or other controversial medical procedures like artificial reproduction can be regulated by professional committees and criminal law; checks and balances seem inclined to evolve into winks and nods.

How many others?

It has been suggested that lack of clarity in Ministry policy would likely generate conflict in the workplace. Granted that such conflict would probably involve a minority of workers, was there any evidence of this? Moore reported that she had met over fifty people in different occupations who had experienced discrimination in their employment as a result of their views on abortion. "At least half the Ministry cases do not want to testify," she wrote, "because they are afraid of disciplinary action." (Summary 44)

Particularly in light of Cecilia Moore's experience, it is difficult to reconcile this state of affairs with the idea that there is no need for protection of conscience legislation.

Notes

1. *Moore v British Columbia [Ministry of Social Services],* Canadian Human Rights Reporter*,* Vol. 17, Decision 24; 49 (Cited hereinafter as CHRR).

2. CHRR 50

3. CHRR 68

4. *Summary of the Evidence of Cecilia* Moore, 28.(Cited hereinafter as *Summary*).

5. CHRR 64

6. CHRR 62-63

7. CHRR 47

8. CHRR 39

9. CHRR 31

10. CHRR 26

11. CHRR 31

12. CHRR 32, 57

13. CHRR 39, 57

14. CHRR 56-57

15. Vatican Council II, *Pastoral Constitution on the Church in the Modern World* (*Gaudium et spes*) 51

16. CHRR 53

17. CHRR 58

18. *Summary*, 19

19. *Summary*, 41

20. Mate, Gabor, "A woman's choice - as it in fact was under committee". *Vancouver Sun*, 22 February, 1988.